



Issue Date: 03 October 2018

CASE NO. 2017-FRS-00067

In the Matter of

JEFFREY S. LIPP,
Complainant,

v.

BNSF RAILWAY COMPANY,
Respondent.

Appearances: Jeffrey S. Lipp
Self-represented Complainant

Michelle T. Friend, Esq.
Hedger Friend, P.L.L.C.
for Respondent

Before: Steven B. Berlin
Administrative Law Judge

DECISION AND ORDER DISMISSING COMPLAINT

This case arises under the whistleblower protection provisions of the Federal Rail Safety Act, 49 U.S.C. § 20109, and its implementing regulations, 29 C.F.R. Part 1982. Complainant is self-represented. For more than a year, Complainant's repeated lack of compliance with disclosure, discovery, and pre-trial filing requirements and orders has significantly burdened Respondent's efforts to prepare for a hearing and has stymied all progress toward a hearing. Currently pending is Respondent's motion for a dismissal sanction. I will grant the motion.

Procedural History

An ALJ issued a Notice of Docketing in this matter on June 29, 2017. As the first order issued, the Notice of Docketing opened discovery.¹ On July 3, 2017, I noticed the matter for a hearing to begin on February 29, 2018. I issued a Pre-Trial Order with the notice of hearing.

¹ See 29 C.F.R. § 18.50(a)(1).

The Pre-Trial Order requires the parties within 14 days to comply with the initial disclosure requirements stated at 29 C.F.R. § 18.50(c)(1).² Each party thus was required to serve initial disclosures on or before July 17, 2017. The order explicitly states that the requirement to make initial disclosures applies to cases where a party is represented as well as “where a party does not have an attorney.”³ The order also notifies the parties that a “[f]ailure to comply with this Order subjects the offending party to sanctions” with citations to the applicable rules. The referenced sanctions include, among other possibilities, a dismissal sanction. *See* 29 C.F.R. §§ 18.12(b)(7), 18.57(b)(1)(v).⁴

On November 20, 2017, Respondent moved to compel Complainant to serve initial disclosures. It stated that, despite numerous requests, Complainant had failed to serve any of the required disclosures. Respondent noted that the discovery cut-off date was about six weeks away and argued that Complainant’s failure to serve initial disclosures was prejudicing Respondent’s ability to prepare for the scheduled hearing.

On January 9, 2018, I granted Respondent’s motion and ordered Complainant to comply with the initial disclosure requirements within 14 days. I explained in specific detail what Complainant was required to do.

On January 12, 2018, the parties filed an agreed motion to continue the hearing. As only three days had passed since the order compelling the initial disclosures, Complainant understandably had not yet complied. Respondent, however, added a new concern: It stated that Complainant had also failed to respond to discovery requests that Respondent propounded two months earlier, on November 15, 2017. Respondent argued that the continuance would allow the parties to complete discovery.

On January 16, 2018, I granted the joint motion and continued the hearing to July 23, 2018. I discussed Complainant’s right to retain counsel, the benefits of an attorney’s expertise and advice, and a caution that, although my staff could provide general procedural information, my staff and I could not provide any party with legal advice. I stated that, if Complainant did not retain a representative, he must familiarize himself with the applicable procedural rules, and I told him where he could find those rules.

Complainant did not fully comply with the order compelling initial disclosures. The applicable rule (which I recited in the Order Compelling Initial Disclosures) requires:

- A. The name and, if known, the address and telephone number of each individual likely to have discoverable information—along with the subjects of that information—that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment;

² Notice of Hearing and Pre-Trial Order (July 3, 2017), at 2.

³ *Id.*

⁴ The cited sanctions also include a stay of proceedings, striking claims or defenses, directing that matters involved be taken as established, and excluding evidence. *See* 29 C.F.R. § 18.57(b)(1) and (d)(3).

- B. A copy—or a description by category and location—of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment; and
- C. A computation of each category of damages claimed by the disclosing party—who must also make available for inspection and copying as under [29 C.F.R.] § 18.61 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered.

29 C.F.R. § 18.50(c)(1).

Looking at the record as a whole (and not just at formally designated initial disclosures), Complainant did identify some witnesses during a deposition on December 14, 2017. He produced some emails. Beyond that, he failed to make the required disclosures. He admitted at the deposition that he had other relevant documents, and he agreed to produce them, but he had not done so, nor had he produced any other documents. He also failed to provide a computation of damages.

On June 8, 2018, Respondent filed a motion for a dismissal sanction based on Complainant's failure to serve a response to: (1) its interrogatories, and (2) its requests for production. It had served the discovery demands on November 15, 2017. Complainant's answers and responses were due on December 15, 2017. Before filing the motion, Respondent's counsel had informally requested answers and responses five separate times (three by email and two by telephone) – all to no avail.

On June 11, 2018, I issued an order requiring Complainant to show cause why his case should not be dismissed. I let him know the kinds of responses he might want to make. I stated, for example, that he might choose to argue that no sanction should be issued and that, in the alternative, any sanction imposed should be less severe than a dismissal, giving reasons.

In addition, as the hearing date (July 23, 2018) was approaching, I reminded him that he might want to get a lawyer. I also reminded him that, represented or not, he was required to make certain pre-hearing submissions and disclosures, and that a failure to comply with this requirement would lead to the imposition of sanctions. As I stated in the Order to Show Cause:

As the Pre-Trial Order states, you must file with this Office and serve on Respondent's counsel 30 days before the hearing: (1) a witness list, (2) an exhibit list, and (3) a pre-trial statement. You must also serve on Respondent's counsel a copy of every exhibit you will offer as evidence at the hearing. The Pre-Trial Order gives further details of what is required for each of these. All this is required to be completed by June 22, 2018. *Sanctions will be imposed for non-compliance.*

Order to Show Cause at 2 (emphasis added).

On June 22, 2018, Respondent timely filed its required Pre-Hearing Statement.

For his part – despite my specific reminder and warning of sanctions – Complainant failed to file any portion of the required pre-hearing submissions: a statement of the case, including a witness list, an exhibit list, and a discussion of the issues and evidence. His filing was not simply untimely; Complainant never filed or served pre-hearing submissions at all. He also failed to serve a set of his hearing exhibits on defense counsel.

Instead, on June 22, 2018, Complainant moved for another continuance. He said that he had been having health issues “in the last few months which ha[d] slowed down [his] progress with this case” along with a home foreclosure and attempts to seek legal counsel. Complainant included no documentation or opinion from a health care provider to support the assertion that he had health issues that were impairing his ability to prepare the case.

Respondent opposed the continuance. It stated that, in view of its motion for sanctions, Complainant had served answers to its interrogatories (except Interrogatory No. 11) but had not responded to its requests for production. Respondent also noted that Complainant still had not served the required pre-hearing statement.

Three days later (June 25, 2018), Complainant submitted two filings for the record. He did not submit any of the required pre-hearing filings. He did not dispute that he had failed to meet each of the pre-hearing requirements. Rather, he argued that Respondent was not being “forthcoming” about the amount of discovery he’d actually served,⁵ that his failures had not prejudiced Respondent, and that no sanction should be imposed. Complainant offered no argument that, even if some sanction was appropriate, a lesser sanction than dismissal would be sufficient and more appropriate.

In particular, Complainant offered as reasons for his failures to serve discovery that: he “had an attorney lined up” who ultimately did not take his case; the mortgage on his house had been foreclosed; and he had moved to a different state, which made it difficult to access his documents (including the records of his medical providers). He asserted that he had a “disability directly related to Respondent’s action in this case.” He said the disability was making it “increasingly more difficult” for him to represent himself. But he said nothing to describe his disability or explain how it affected his ability to comply with the requirements of the litigation. Nor did he request an accommodation that he might need to comply fully and timely with his litigation obligations. He said that his medical providers had advised him to get an extension and retain counsel; otherwise it could present a risk to his health, though he did not explain what that risk was.

Finally, Complainant said that an attorney had agreed to take his case if the attorney would have 90 days to prepare for a hearing. Complainant did not identify the attorney. Based on the

⁵ In particular, Complainant stated that he had produced “several” documents at his deposition.

attorney's statement, Complainant sought an extension of 90 days to provide the attorney with "enough time to properly handle the case."

On July 2, 2018, Respondent filed a supplemental motion in further support of a dismissal. It stated that Complainant had still not served responses to Respondent's requests for production, a computation of damages, pre-hearing submissions, or copies of the exhibits he would be offering at the hearing. It argued that this was unfairly prejudicing Respondent's ability to prepare for a hearing.⁶

On July 10, 2018, Complainant filed a supplement to his motion for a continuance. He included a written statement (dated July 9, 2018) from a nurse practitioner. This was the first and only documentation he offered to support his contention that he was medically "disabled" in a way that impaired his ability to meet his litigation obligations. The nurse practitioner's statement in its entirety is: "[Complainant] Jeffrey Lipp has been seen and was under my care. In my opinion he is best served by having legal representation, but not to be representing himself in a complex litigation."

I find nothing in this statement to suggest that Complainant is medically unable to represent himself or to meet deadlines – especially after I provided him an explicit explanation of what he needed to do and gave him extra time to get it done. The nurse stated nothing about a medical condition or a disability. She stated nothing to suggest that Complainant medically requires a particular accommodation or any accommodation. She said nothing about health issues that had been "slowing" Complainant's "progress" on the case or putting Complainant "at risk." The nurse's use of the past tense to describe her professional relationship with Complainant (*viz.*, Complainant "*has been* seen and *was* under my care") brings into question how current her information was at the time she wrote the note.

Really, the nurse practitioner states little more than would be said of any self-represented party in a whistleblower action: they probably would be "best served by having legal representation." Her comment offers nothing beyond what I addressed when I advised Complainant that he likely would be well-served to retain an attorney or a non-attorney representative, but that he had to do this for himself: OALJ does not appoint attorneys for parties.

On July 11, 2018, I vacated the hearing set for July 23, 2018, to allow time to consider the pending motions. Although there thus has been no hearing scheduled since the order issued on July 11, 2018, no attorney has filed an appearance on Complainant's behalf.

Discussion

When a party fails to comply with an administrative law judge's orders and fails to show good cause for such failure, the judge has discretion to dismiss the case. 29 C.F.R. §§ 18.12(b)(7),

⁶ Respondent also asserted that Complainant would rely on medical records to support his claims, yet he had objected – based on privacy – to production of those records. (Respondent cited Comp's Depo, 192:21-24.) Respondent never moved to compel production of the medical records. Nor had it previously argued that Complainant's privacy objections should be overruled. I therefore draw no inferences adverse to Complainant based on his raising these objections and not produced the requested medical records.

18.57(b)(1)(v).⁷ “If an ALJ is to have any authority to enforce prehearing orders, and so to deter others from disregarding these orders, sanctions such as dismissal or default judgments must be available when parties flagrantly fail to comply.” *Matthews v. Labarge, Inc.*, ARB No. 08-038 (ARB Nov. 26, 2008), slip op. at 2 (affirming dismissal when complainant failed to comply with order compelling discovery and with order requiring pre-hearing submission), quoting *Yarborough v. U.S. Dep’t of the Army*, ARB No. 05-117, slip op. at 6 (ARB Aug. 30, 2007) and citing cases at fn. 7. “ALJs have ‘inherent authority’ to ‘manage their own affairs so as to achieve the orderly and expeditious disposition of cases.’” *Walia v. The Veritas Healthcare Solutions, LLC*, ARB No. 14-002 (ARB Feb. 27, 2015) (affirming dismissal after Prosecuting Party failed to comply with order compelling discovery and requiring attendance at a deposition and, despite warnings of sanctions including dismissal, failed to respond to an order to show cause), quoting *Newport v. Fla. Power & Light, Co.*, ARB No. 06-110, slip op. at 4 (ARB Feb. 29, 2008); *see also*, *Butler v. Anadarko Petroleum Corp.*, ARB No. 12-041 (ARB June 15, 2012), slip op. at 3 (affirming dismissal based on Complainant’s repeated and contumacious failure to appear for her own deposition); *In re Supervan, Inc.*, ARB No. 00-0008, (ARB Sept. 30, 2002), slip op. at 7 (affirming default judgment against self-represented party for failure to comply with two orders compelling discovery).

The facts here are very similar to those in *Matthews*, *Walia*, and *Supervan, supra*. Complainant was required to make his initial disclosures in July 2017. In an order compelling him to make those disclosures, I explained exactly what was required. He still has not substantially or adequately complied with that order. He also has not substantially or adequately complied with Respondent’s requests for production. As the hearing date approached, I issued an order reminding Complainant of my earlier order requiring the parties to make pre-hearing disclosures and exchanges. I warned Complainant that sanctions would be imposed if he failed to comply with these requirements. The filing deadline was June 22, 2018. Now, more than three months later, Complainant has still not complied with these requirements.

Complainant’s failures cannot be addressed by a flexible construction of the manner in which he responded to his obligations.⁸ Had he produced the needed information in a simplified or substitute format, I could construe the production as sufficient. But Complainant failed to produce the required documents and information in any form despite Respondent’s many informal efforts, Respondent’s repeated motions, and the ALJ’s repeated orders and express reminders and warnings.

I urged Complainant to retain counsel or a non-attorney representative, advised him how difficult it is for non-attorneys to litigate cases of this kind, told him how to access the applicable procedural rules with which he had to comply, reminded him that he had to file the pre-hearing statement (witness list, exhibit list, and case summary) and serve copies of exhibits on the

⁷ As discussed above, I also stated in the pre-trial order that I might impose sanctions for failure to comply with the pre-trial order, which includes failures to make disclosures as required.

⁸ *See, e.g., Pik v. Credit Suisse AG*, ARB No. 11-034 (ARB May 31, 2012), slip op. at 3 (noting that self-represented complainant is entitled to some leeway, but still bears the same burdens as represented parties), citing *Young v. Schlumberger Oil Field Serv.*, ARB No. 00-075 (ARB Feb. 28, 2003), slip op. at 10.

defense by a date certain, and warned him repeatedly that sanctions would be imposed for compliance failures.

Asking Respondent to go to trial without initial disclosures, full responses to its document requests, a list of witnesses and exhibits, and a set of Complainant's trial exhibits is unfairly prejudicial; it is a reversion to trial by ambush. Our applicable procedures and my orders are designed to avoid trial by ambush. The requirements to exchange information before the hearing also facilitate voluntary settlement; often settlement is achievable only when the parties understand the evidence that they will have to confront at the hearing. For example, Complainant's computation of damages could be useful as talking points and "ballpark" figures in settlement discussions. Complainant's failures have significantly interfered with the judicial process, essentially stymying the litigation for over a year.

I do not find that Complainant has acted in bad faith. But he has acted in conscious disregard of his obligations. If he did not read or fully understand the Pre-Trial Order, he should have learned more through his numerous discussions with defense counsel about the initial disclosures and his discovery obligations. Failing that, he was required to appreciate his obligations after I explained them in the orders and warnings described above. Those orders and warnings extended to all three areas of Complainant's failure: initial disclosures, discovery, and pre-hearing disclosures, exchanges, and submissions.

I reject Complainant's excuses as vague, unsubstantiated, and insufficient. He submitted a nurse practitioner's opinion that said no more than that he would be better served if he had a lawyer. As I stated above, that is true of almost all complainants in whistleblower cases and is something I repeatedly addressed when I advised Complainant of his right to retain counsel and urged him to do so. Complainant has had over a year to do that. To this day, no attorney has appeared on Complainant's behalf.

Moreover, the nurse practitioner (who apparently was no longer treating Complainant) said nothing to suggest that Complainant was medically unable to comply with the requirements and orders that I've described above. Finally, I do not doubt that moving one's house might take considerable time and make it difficult to access records for a while – perhaps a month or even six weeks. But it does not explain Complainant's very long delays that have been occurring in this case from the time the case first arrived at this Office in June 2017. These delays amount to "flagrant, repeated, and prejudicial" dilatory action. *See Butler*, ARB No. 12-041, *supra*, slip op. at 3.

Lesser sanctions. Our rules allow a judge discretion to impose other and lesser sanctions. *See* 29 C.F.R. § 18.57(b)(1). These are:

- (i) Directing that the matters embraced in the order or other designated facts be taken as established for purposes of the proceeding, as the prevailing party claims;
- (ii) Prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;
- (iii) Striking claims or defenses in whole or in part; [or]

(iv) Staying further proceedings until the order is obeyed.

29 C.F.R. § 18.57(b)(1). A dismissal is a severe sanction. If any lesser sanction would be adequate to assure Complainant's future compliance and deter non-compliance, it must be considered. I conclude, however, that no less severe alternative would be adequate here.

The difficulty is that the other sanctions (except a stay) likely would have the same result as a dismissal. The scope of Complainant's failures is so broad that an order directing that the facts to which the disclosures relate be taken as established favorably to Respondent could only lead to a decision on the merits favoring Respondent. The same result will occur if I exclude all documentary evidence that Complainant might offer and all witnesses whom he might call (because he served no exhibit list and no pre-hearing witness list). Complainant has a burden in cases under the Federal Rail Safety Act to make out a *prima facie* case. Without witness testimony or documentary exhibits, he could not carry that burden, and the case would be dismissed at the conclusion of Complainant's (very brief) presentation at hearing. As Complainant has only a single claim, striking that claim would leave nothing for Complainant to litigate; Respondent would be entitled to a favorable decision on the merits.

That leaves only a stay until Complainant has complied with all requirements. The Secretary of Labor requires that cases under the Federal Rail Safety Act be expedited. *See* 29 C.F.R. § 1982.107(b). This is generally consistent with the statutory provision allowing complainants to refile their case *de novo* in a federal district court if the Secretary of Labor has not issued a final decision within 210 days after a complainant files her administrative complaint with the Occupational Safety & Health Administration. *See* 49 U.S.C. § 20109(d)(3); 29 C.F.R. § 1982.114(a). Complainant filed his OSHA complaint in August 2015. For a case such as this, which has been pending at the Department of Labor for over three years, a stay would be inconsistent with the statute and regulations.

In addition, Complainant has had significant time to comply with these requirements. He still has not fully complied with the initial disclosures that were due in July 2017 – more than a year ago – despite repeated orders and warnings of sanctions. I have no reason to believe that a brief stay in the proceedings would result in Complainant's future compliance with his obligations.

Conclusion. Given the thoroughgoing burden Complainant has placed on Respondent – and to some extent on this Office – I conclude that a substantial sanction is warranted. Unfortunately, monetary sanctions are not among those permitted under our rules. Other sanctions short of a dismissal would have the same effect as a dismissal; they would lead inextricably to a decision favorable to Respondent on the merits. I find Complainant's excuses for his failures unpersuasive. I am also unpersuaded that a stay would end Complainant's pattern of failures that appears on this record. Having concluded that a substantial sanction is warranted, I find the only

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viable and adequate option is a dismissal.

Order

For the foregoing reasons, Complainant's complaint is DISMISSED. His claim is DENIED.
SO ORDERED.

STEVEN B. BERLIN
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within fourteen (14) days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: <https://dol-appeals.entellitrak.com>. If you have any questions or comments, please contact: Boards-EFSR-Help@dol.gov

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-filing; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1982.110(a). Your Petition must specifically identify the findings, conclusions

or orders to which you object. You waive any objections you do not raise specifically. *See* 29 C.F.R. § 1982.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and, in cases in which the Assistant Secretary is a party, on the Associate Solicitor, Division of Fair Labor Standards. *See* 29 C.F.R. § 1982.110(a).

If filing paper copies, you must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and you may file an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review. If you e-File your petition and opening brief, only one copy need be uploaded.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and may include an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies. If you e-File your responsive brief, only one copy need be uploaded.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board. If you e-File your reply brief, only one copy need be uploaded.

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. §§ 1982.109(e) and 1982.110(a). Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. §§ 1982.110(a) and (b).